



MARALEX RESOURCES, INC.

186 IBLA 34

Decided July 10, 2015



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

MARALEX RESOURCES, INC.

IBLA 2013-205

Decided July 10, 2015

Appeal from a decision of the Deputy State Director, Energy, Lands, and Minerals, Colorado State Office, Bureau of Land Management, upholding, on State Director Review, CO-13-04, four Notices of Incidents of Noncompliance, issued by the Tres Rios (Colorado) Field Office, Bureau of Land Management. SDR CO-13-04; GDT 13-06 through GDT 13-09.

Decision affirmed.

1. Oil and Gas Leases: Generally -- Oil and Gas Leases:
Inspections

Section 101(b) of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1711(b) (2012), directs the Secretary to “establish procedures to ensure that authorized and properly identified representatives of the Secretary will inspect at least once annually *each lease site* producing or expected to produce significant quantities of oil or gas in any year or which has a history of noncompliance with applicable provisions of law or regulations[.]” (Emphasis added.) Section 108(c) of FOGRMA, 30 U.S.C. § 1718(c) (2012), provides that, “[f]or the purpose of making any inspection or investigation under [FOGRMA], the Secretary shall have the same right to enter upon or travel across *any lease site* as the lessee or operator has acquired by purchase, condemnation, or otherwise.” (Emphasis added.) Nothing in sections 101(b) and 108(c) of FOGRMA or the legislative history limits the applicability of sections 101(b) and 108(c) to Federal or Indian lease sites.

BLM, as the authorized representative of the Secretary, is authorized to inspect non-Federal/non-Indian lease sites for the purpose of determining whether oil or gas

production from non-Federal/non-Indian lands is being accurately recorded and reported, when that production is properly attributable to Federal or Indian lands, under unit or communitization agreements, since royalties computed on such production must be paid to the Federal government or an Indian tribe.

APPEARANCES: William E. Zimsky, Esq., Durango, Colorado, for appellant; Philip C. Lowe, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management, U.S. Department of the Interior.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Maralex Resources, Inc., a working interest owner in a communitized area of Indian and private mineral estates, and Alexis M. and Mary C. O'Hare, owners of a private surface estate overlying a private mineral estate in the communitized area (collectively, Maralex), have appealed from a July 9, 2013, decision of the Deputy State Director, Energy, Lands, and Minerals, Colorado State Office, Bureau of Land Management (BLM), upholding, on State Director Review (SDR), CO-13-04, four Notices of Incidents of Noncompliance (INCs), GDT 13-06 through GDT 13-09, issued by the Tres Rios (Colorado) Field Office, BLM, on February 26, 2013.¹ The INCs concern alleged incidents of noncompliance arising from Maralex's refusal to provide access for BLM inspection of private lease sites associated with ongoing oil and gas operations at the Katie Eileen 34-7-35 Well Nos. 2, 2A, 3, and 4 (hereinafter, collectively, Wells), situated in the S½ sec. 35, T. 34 N., R. 7 W., New Mexico Principal Meridian (NMPM), La Plata County, Colorado, within the Southern Ute Indian Reservation.

Appellants have not demonstrated that BLM erred in issuing the INCs, and, therefore, we will affirm the Deputy State Director's July 2013 SDR decision.

Background

At issue is a 320-acre tract of lands in the S½ sec. 35 that encompasses 240 acres of private surface/mineral estate and 80 acres of Indian surface/mineral

¹ By order dated Oct. 23, 2013, the Board denied a request by Maralex to stay the effect of the Deputy State Director's July 2013 SDR decision, during the pendency of the appeal.

estate, within the Ignacio Blanco field. *See generally* Master Title Plat, T. 34 N., R. 7 W., NMPM, Colorado, dated Jan. 31, 1990; Historical Index, T. 34 N., R. 7 W., NMPM, Colorado. It is undisputed that the O'Hares own the surface and mineral estate in 120 acres of land in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$, on which all four wells are situated. *See* Statement of Reasons for Appeal (SOR) at 3. The Southern Ute Indian Tribe (Tribe) holds the surface and mineral estate in the W $\frac{1}{2}$ SW $\frac{1}{4}$. The remainder of the lands (N $\frac{1}{2}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SE $\frac{1}{4}$) is privately-owned by the O'Hares, J. Elmer and Wanda Lee Kenner, and Irma Rowse.

On June 6, 1974, the Tribe issued an Indian oil and gas lease, Mining Lease Contract No. MOO-C-1420-1531, for its mineral estate in the W $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 35 to Sun Oil Company, pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (2012). The Tribe holds a 16.667% royalty interest in the leased land. On April 28, 1995, the O'Hares, who hold an 18.75% royalty interest in the leased land, in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 35, issued a private oil and gas lease for their mineral estate to Maralex. The O'Hares, Kenners, and Rowse issued three oil and gas leases for the remainder of the lands in the N $\frac{1}{2}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 35.

All of the Wells are physically situated on the O'Hares' private surface/mineral estate in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 35, within two areas, each of which is enclosed by a fence and a locked gate.² *See* Decision at 1. It is undisputed that, at the time of issuance of BLM's July 2013 SDR decision, the Wells were producing from the Fruitland coal formation. *See id.* at 2; Letter to BLM from Maralex, dated Mar. 27, 2013, at 2.

The Tribe and the Bureau of Indian Affairs (BIA) approved a Communitization Agreement (CA), COC-60123, effective May 1, 1996, entered into by Amoco Production Co., as the record title owner of the Tribe's lease of the W $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 35, Maralex, as the working interest owner under the Tribe's lease of the W $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 35 and one of the record title owners of the O'Hares' private lease of the SW $\frac{1}{4}$ SE $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 35, SG Interests III, Ltd. (SG III), as one of the record title owners and the working interest owner under the O'Hares' private lease of the SW $\frac{1}{4}$ SE $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 35, and SG Interests I, Ltd. (SG I), as the operator of the

² The Wells were drilled pursuant to Applications for Permits to Drill approved by the Director, Colorado Oil and Gas Conservation Commission (COGCC), on July 27, 1995 (Well No. 2), Apr. 18, 2003 (Well No. 2A), and Apr. 12, 2007 (Well Nos. 3 and 4). *See* Exs. A-D attached to SOR.

entire communitized area.^{3,4} See CA, Exhibit “A”, at A-1 to A-3. The CA encompasses the Fruitland coal formation underlying all of the lands in the S½ sec. 35, known as the Communitized Area. The CA, which is “subject to all applicable Federal and State laws or executive orders, rules and regulations,” provides that it will continue in effect for 2 years, and so long thereafter as oil or gas is produced from the Fruitland coal formation in the Communitized Area in paying quantities. CA, ¶ 9, at 3; see *id.*, ¶ 10, at 3.

Since the time of communitization, the operator has undertaken all drilling and production operations in connection with the Wells, in order to exploit the Fruitland coal formation underlying the communitized lands. See Letter to BLM from Maralex, dated Mar. 27, 2013, at 2; SOR at 3. Pursuant to the CA, “[t]he Communitized Area shall be developed and operated as an entirety, with the understanding and agreement between the parties hereto that all Communitized Substances produced therefrom shall be allocated among the leaseholds comprising said area in the proportion that the acreage interest of each leasehold bears to the entire acreage interest committed to this agreement.” CA, ¶ 5, at 2. While all of the oil and gas being produced comes from the private mineral estate, the costs and benefits of production are attributable, under the CA, to the O’Hares, Kenners, Rowse, and the Tribe, as the mineral estate owners of the communitized lands. See, e.g., *Tricentrol United States, Inc.*, 97 IBLA 387, 392 (1987), *aff’d sub nom.*, *Norfolk Energy, Inc. v. Hodel*, No. CV-87-188-GF-PGH (D. Mont. Sept. 26, 1988), *aff’d*, 898 F.2d 1435 (9th Cir. 1990) (“[o]perations or production pursuant to [an approved communitization] agreement shall be regarded as operations or production for each lease committed to the agreement” (quoting *Marathon Oil Co.*, 68 IBLA 191, 192 (1982))).

By the time of BLM’s July 2013 SDR decision, the O’Hares had leased their mineral estate in the SW¼SE¼ and E½SW¼ sec. 35 to SG III and Maralex. And on or about February 25, 2008, Maralex had notified the COGCC, that, effective June 1, 2007, it was the operator of the Wells. See Letter to BLM from Maralex, dated Mar. 27, 2013, at 2 (“Maralex operates the four wells that are subject to the four INCs”); SOR at 3, 12.

³ Maralex and SG III, as the record title owners of the private leases of the N½SE¼ and SE¼SE¼ sec. 35, and SG III, as the working interest owner under these leases, committed these leased lands to the CA.

⁴ Alexis M. O’Hare, President of Maralex, signed the CA, on behalf of Maralex, on Sept. 3, 1996. See SOR at 12.

BLM now seeks to gain access to the Wells, for the purpose of inspecting well equipment, facilities, and operations, in order to assess compliance with the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. §§ 1701-1759 (2012), which provides for the accurate and timely assessment, accounting, and collection of royalties owed for oil and gas produced from or attributable to Federal and Indian communitized lands. Although all of the oil and gas at issue is produced from private mineral estate, from wells situated on private surface estate, pursuant to the CA, such production is allocated to all of the oil and gas interests, including the O'Hares, Kenners, and Rowse, as the owners of record title to the mineral estate in the SE $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 35 (75%), and the Tribe, as the owner of record title to the mineral estate in the W $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 35 (25%).

Most recently, Gabriel Trujillo, a BLM Petroleum Engineering Technician, notified Maralex, by e-mail dated February 11, 2013, that he planned to inspect the Wells. Trujillo was referred to the O'Hares by Maralex because the Wells were situated on their private land. See E-Mail to Trujillo from Christi Reid, Maralex, dated Feb. 12, 2013. Subsequently, Trujillo talked to Alexis M. O'Hare, who is said to have refused access to the Wells for BLM inspection purposes on February 22, 2013, because they are situated on the O'Hares' private land. See Conversation Record of Trujillo, dated Feb. 22, 2013 ("[O'Hare] told me that [BLM] had no rights to be on his land because the surface and the minerals were owned by him. I told him that it didn't matter because it was part of a CA agreement."); E-Mail to Reid from Trujillo, dated Feb. 22, 2013 ("I just got off the phone with Mickey[.][⁵] . . . He do[es]n't realize that regardless if the wells are FEE surface and FEE minerals they are tied to a Communitization Agreement with the [T]ribe."). Thereafter, Trujillo, accompanied by Logan Briscoe, a BLM Law Enforcement Officer, attempted to access the Wells, finding the gate to one of the fenced areas locked. He did not break the lock or attempt to access the other fenced area, since access to it required crossing the O'Hares' private land. Consequently, Trujillo did not inspect any of the Wells.

On February 26, 2013, BLM issued the four INCs, pursuant to 43 C.F.R. § 3163.1(a). Maralex received the INCs on February 28, 2013. Each INC cited Maralex with having engaged in a minor violation of 43 C.F.R. § 3162.1(b) on February 22, 2013, by having failed to permit an authorized BLM representative "to enter upon, travel across and inspect lease sites and records normally kept on the

⁵ "Mickey" O'Hare appears to refer to Alexis M. O'Hare, who was one of the owners of the private surface/mineral estate in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 35, as well as the President of Maralex.

lease . . . without advance notice,” and thus by refusing access to each of the Wells. In each case, BLM ordered Maralex to take corrective action by either providing BLM a key to the existing lock or allowing BLM to place its own lock on the gate, and thus afford BLM access to the wells, by March 25, 2013. BLM notified Maralex that failure to take the corrective action by the established deadline might subject Maralex to an assessment for noncompliance pursuant to 43 C.F.R. § 3163.1 and a civil penalty pursuant to 43 C.F.R. § 3163.2.

On March 27, 2013, Maralex sought SDR of the four INCs pursuant to 43 C.F.R. § 3165.3(b). Maralex conceded that BLM has broad authority under 43 C.F.R. § 3162.1(b) to inspect Federal and Indian lease sites in order to ensure operations conform with the regulations in 43 C.F.R. Part 3160, as required by 43 C.F.R. § 3161.1(a). Letter to BLM, dated Mar. 27, 2013, at 3; *see id.* at 3-5. However, it argued that this was only one part of the regulation’s “two-tiered inspection regime,” and under the second tier, BLM has only “limited authority” pursuant to 43 C.F.R. § 3161.3(a) (not 43 C.F.R. § 3162.1(b)) to inspect *private lease sites*, when the private leased lands are communitized with Federal or Indian leased lands, in order to ensure that operations conform with specific regulations relating to “site security, measurement, reporting of production and operations, and assessments or penalties for noncompliance with such requirements,” as required by 43 C.F.R. § 3161.1(b). *Id.* at 3.

Most importantly, Maralex asserted that 43 C.F.R. § 3162.1(b) was not applicable to private lease sites, because it expressly provided for the inspection of “lease sites,” where 43 C.F.R. § 3160.0-5 defines “[l]ease site” as “any lands, including the surface of a severed mineral estate, on which exploration for, or extraction and removal of, oil or gas is authorized *under a lease*,” and “[l]ease,” in turn, as “any contract, profit-share arrangement, joint venture or other agreement *issued or approved by the United States* under a mineral leasing law that authorizes exploration for, extraction of or removal of[,] oil or gas.” *Id.* (emphasis added.) It also averred that 43 C.F.R. § 3162.1(b) broadly states that the operator’s permission to inspect includes providing access to lease sites “for determining whether there is compliance with . . . the regulations” in 43 C.F.R. Part 3160, which necessarily means Federal and Indian lease sites, since inspections on non-Federal/non-Indian lease sites are narrowly confined to determining compliance with the regulations in 43 C.F.R. Part 3160 relating to site security, measurement, reporting of production and operations, and assessments or penalties for noncompliance with such requirements.

In sum, Maralex concluded that the private lease sites at issue did not fall within the ambit of 43 C.F.R. § 3162.1(b), because they were located on private surface/mineral estate, and constituted lands leased by a party other than the United States: “Section 3162.1(b) is, by definition, confined to inspections of lease sites that

are located on Federal Tracts. The lease sites at issue . . . are located on a [Private] Fee Tract.” Letter to BLM, dated Mar. 27, 2013, at 5.

Finally, Maralex argued that, without any statutory or regulatory support, BLM’s exercise of the authority to inspect private lease sites would constitute an unreasonable search and seizure and, even a taking of private property for public use without just compensation, in violation of the O’Hares’ rights, under the Fourth and Fifth Amendments to the U.S. Constitution. See Letter to BLM, dated Mar. 27, 2013, at 3-4, 6-7.

In his July 2013 SDR decision, the Deputy State Director concluded that BLM had the authority, under section 101(b) of FOGRMA, 30 U.S.C. § 1711(b) (2012), and 43 C.F.R. §§ 3161.3 (BLM’s inspection authority) and 3162.1(b) (operator’s inspection responsibilities), to inspect private lease sites, for the jurisdictional purposes listed in 43 C.F.R. § 3161.1(b), when the pertinent private leased lands are communitized with Indian leased lands. See Decision at 3, 4, 5, 6. Indeed, he noted that, “[b]y signing the CA, the O’Hare[s] and Maralex agreed to have BLM inspect their operations [on private lands] within the CA (43 CFR 3162.1(b) within the [jurisdictional] limits provided by 43 CFR 3161.1(b)).” *Id.* at 5. The Deputy State Director held that, “[s]ince the subject wells’ production is subject to a [F]ederal CA and the government receives a portion of the production’s royalty, the BLM is responsible for assuring production accountability,” under 43 C.F.R. § 3161.1(b), and thus “must be allowed to perform the production related inspection *which necessitates physical access to the subject wells and their associated facilities without advance notice.*” *Id.* at 4 (emphasis added). He noted that BLM had specifically cited Maralex in the INCs for a violation of 43 C.F.R. § 3162.1(b), which concerned the operator’s inspection responsibilities, in order “to address *Maralex’s* failure to allow entry for inspections.” *Id.* (emphasis added).

The Deputy State Director further concluded that BLM’s inspection did not violate the O’Hares’ Constitutional rights under the Fourth and Fifth Amendments, since, by entering into the CA, they had contractually agreed to allow BLM to access their private lease sites for the jurisdictional purposes. See Decision at 4-5, 5-6.

Finally, the Deputy State Director stated that BLM was lifting its self-imposed stay of enforcement action, which had been imposed on April 10, 2013, pending completion of SDR, further noting that Maralex’s continued refusal to provide access to the Wells would result in assessments pursuant to 43 C.F.R. § 3163.1, followed, in the event of further noncompliance, by civil penalties pursuant to 43 C.F.R. § 3163.2. See Decision at 1, 6.

Maralex appealed timely from the Deputy State Director's July 2013 SDR decision,⁶ contending that the Deputy State Director erred in upholding the INCs because BLM does not have "the unlimited right to conduct inspections without advance notice" or the right to be afforded "unlimited physical access to the [W]ells and related facilities located on [Private] Fee Tracts, which is applicable only to Federal and Indian lease sites under 43 C.F.R. 3162.1(b)." SOR at 15; *see id.* at 4-5, 6-7. Maralex also raises claims under the Fourth and Fifth Amendments to the U.S. Constitution, asserting that, without the requisite authority, BLM's efforts to inspect private lease sites constituted an unreasonable search and seizure, and, to the extent BLM was authorized to undertake inspections to some extent, its efforts constituted a taking of private property for public use without just compensation, in violation of the O'Hares' rights. *See id.* at 9-11.

Discussion

[1] As with production from Federal or Indian lands, BLM must ensure that production from unitized or communitized non-Federal/non-Indian lands is accurately recorded and reported, for royalty computation purposes, since, pursuant to a unit or communitization agreement, such production is allocated to the unitized or communitized Federal or Indian lands, and royalties computed on such production must be paid to the Federal government or an Indian tribe.

Section 101(a) of FOGPMA, 30 U.S.C. § 1711(a) (2012), directs the Secretary of the Interior to "establish *a comprehensive inspection, collection and fiscal and production accounting and auditing system to provide the capability to accurately determine oil and gas royalties* . . . owed, and to collect and account for such amounts in a timely manner." (Emphasis added.) More specifically, section 108(b) of FOGPMA, 30 U.S.C. § 1718(b) (2012), provides that authorized and properly identified representatives of the Secretary

may[,] without advance notice, enter upon, travel across and inspect lease sites on Federal or Indian lands and may obtain from the operator immediate access to secured facilities on such lease sites, for the purpose of making any inspection or

⁶ BLM reports that, in addition to appealing the July 2013 SDR decision, Maralex allowed Rodney Brashear, a BLM Supervisory Petroleum Engineering Technician, to inspect the Wells on Aug. 13, 2013: "Brashear noted the locations and equipment were in good condition and the meters were in calibration." Opposition to Petition for Stay (Opposition) at 3.

investigation for determining whether there is compliance with the requirements of the mineral leasing laws and [FOGRMA.]

Section 101(b) of FOGRMA, 30 U.S.C. § 1711(b) (2012), directs the Secretary to “establish procedures to ensure that authorized and properly identified representatives of the Secretary will inspect at least once annually *each lease site* producing or expected to produce significant quantities of oil or gas in any year or which has a history of noncompliance with applicable provisions of law or regulations[.]” (Emphasis added.) Unlike section 108(b) of FOGRMA, which is clearly limited to lease sites on Federal or Indian lands, section 108(c), 30 U.S.C. § 1718(c) (2012), provides that, “[f]or the purpose of making any inspection or investigation under [FOGRMA], the Secretary shall have the same right to enter upon or travel across *any lease site* as the lessee or operator has acquired by purchase, condemnation, or otherwise.” (Emphasis added.) Importantly, the statutory term “lease site” in sections 101(b) and 108(c) of FOGRMA is broadly defined as “*any lands or submerged lands, including the surface of a severed mineral estate, on which exploration for, or extraction or removal of, oil or gas is authorized pursuant to a lease[.]*” 30 U.S.C. § 1702 (2012) (emphasis added).

We find nothing in the language or legislative history of sections 101(b) and 108(c) of FOGRMA, or the definition of “lease site,” that limits their applicability to Federal or Indian lease sites. We also do not find anything that precludes BLM, as the authorized representative of the Secretary, from inspecting non-Federal/non-Indian lease sites, for the purpose of determining whether oil or gas production from non-Federal/non-Indian lands is being accurately recorded and reported, for royalty computation purposes, when that production is properly attributable to Federal or Indian lands, under unit or communitization agreements. Rather, “[i]t is the purpose of [FOGRMA] . . . to require the development of enforcement practices that ensure the prompt and proper collection and disbursement of oil and gas revenues *owed to the United States and Indian lessors[.]*” 30 U.S.C. § 1701(b) (2012) (emphasis added). Further, “oil or gas” generally means, for inspection and other royalty accounting purposes under FOGRMA, “any oil or gas originating from, or *allocated to, . . . Federal[] or Indian lands[.]*” 30 U.S.C. § 1702 (2012) (emphasis added).

Maralex does not dispute the fact that, in accordance with the May 1996 CA, production from its private leased land is properly allocated to Indian oil and gas lease MOO-C-1420-1531 or that royalty on such production is properly paid to the Tribe. Nor does it dispute the fact that the Tribe, therefore, has an interest in the accurate recording and reporting of production from the private wells now at issue.

However, Maralex, argues that, despite this interest, BLM does not have the authority, under 43 C.F.R. § 3162.1(b), to inspect these private wells at any time,

without advance notice, for the purpose of ensuring that production from the Wells is being accurately recorded and reported. Rather, it asserts that BLM only has authority, under 43 C.F.R. § 3161.3(a), to inspect these wells at annual intervals, with advance notice, for that purpose and other purposes defined in 43 C.F.R. § 3161.1(b): “Maralex and the O’Hare[]s acknowledge that the BLM has a limited right to inspect the facilities located on the [Private] Fee Tract for [the purpose of] assuring production accountability, including inspections for site security, proper handling, measurement[,] and reporting of production[.]” SOR at 13; *see id.* at 11, 13-14. We find Maralex’s arguments at odds with BLM’s regulations.

To begin, while 43 C.F.R. § 3161.1(a) broadly renders onshore oil and gas operations on Federal or Indian leased lands subject to all of the regulations in 43 C.F.R. Part 3160, 43 C.F.R. § 3161.1(b), admittedly, limits the applicability of the regulations in 43 C.F.R. Part 3160 in the case of private leased lands. *See* Decision at 3 (“43 CFR 3161.1(b) limits jurisdiction on wells and facilities located on [private] fee tracts by providing the limitations [set forth]”). It states that only the regulations in the Part “relating to site security, measurement, reporting of production and operations, and assessments or penalties for noncompliance with such requirements are *applicable to all wells and facilities on . . . privately-owned mineral lands*,” when such lands are “committed to a unit or communitization agreement which affects Federal or Indian interests[.]” 43 C.F.R. § 3161.1(b) (emphasis added). Further, the applicability of such regulations pertains “notwithstanding any provision of a unit or communitization agreement to the contrary.” *Id.*

The record establishes that the lands in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 35, on which the Wells are situated, are “privately-owned mineral lands committed to a . . . communitization agreement which affects . . . Indian interests[.]” 43 C.F.R. § 3161.1(b). We conclude, therefore, that the regulations in 43 C.F.R. Part 3160 “relating to site security, measurement, reporting of production and operations, and assessments or penalties for noncompliance with such requirements,” or what BLM terms “site security and production verification,” apply to such lands, even though the surface and mineral estate is owned by the O’Hares. Opposition at 6; *see* 52 Fed. Reg. 5384, 5386 (Feb. 20, 1987) (“The fact that Federal or Indian lands are committed to agreements for the purpose of drilling and development of [privately-held mineral] . . . lands in the most benefic[i]al manner is all that is needed to establish the responsibility of the [BLM] to ensure that the intent of [FOGRMA] and other mineral leasing laws as to royalty accountability is carried out on those lands”); 51 Fed. Reg. 3882, 3883 (Jan. 30, 1986) (“The preamble to the final rulemaking published on September 21, 1984, stated that the [BLM] had limited authority over non-Federal and non-Indian sites within [F]ederally supervised unit and communitization agreements. It did not specify which regulations were applicable to such operations. This proposed rulemaking clarifies that[.]”).

Accordingly, in order to ensure the correct payment of the Indian share of royalties on production from lands committed to a communization agreement, BLM is authorized to investigate and determine that no theft or other loss of oil or gas is occurring, that the lease sites are otherwise secure, and that production is accurately measured and reported, even though the surface and mineral estate is owned by the O'Hares. The scope of BLM's inspection and verification authority on non-Federal lands, and of an operator's inspection responsibilities are governed by 43 C.F.R. §§ 3161.3(a) and 3162.1(b), respectively.

The regulation at 43 C.F.R. § 3161.3(a), implementing section 101(b) of FOGRMA, directs BLM to inspect "each Federal and Indian lease site" and "*each lease site on non-Federal or non-Indian lands* subject to a formal agreement such as a unit or communitization agreement which has been approved by the Department of the Interior and in which the United States or the Indian lessors share in production," subject to certain criteria, regarding any lease site, which "is producing or is expected to produce significant quantities of oil or gas in any year or which has a history of noncompliance with applicable provisions of law or regulations, lease terms, orders or directives." *Id.* (emphasis added).⁷ It is undisputed that the private lands at issue in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 35 are subject to a communitization agreement approved by the Department, under which the Tribe shares in production, and also that the lease sites on such private lands are producing or expected to produce significant quantities of oil or gas.

Furthermore, the rule at 43 C.F.R. § 3162.1(a) generally governs what is required of "[t]he operating rights owner or operator," without specifying whether it is the owner or operator in the case of a Federal or Indian lease or in the case of a non-Federal/non-Indian lease. (Emphasis added.) Such owner or operator is required to comply with applicable laws and regulations, lease terms, orders, and directives that concern, *inter alia*, "conducting all operations in a manner which ensures the proper handling, measurement, disposition, and site security of leasehold production[.]" 43 C.F.R. § 3162.1(a). Further, 43 C.F.R. § 3162.1(b) broadly states, *inter alia*, that "[t]he operator shall permit properly identified authorized representatives to enter upon, travel across and inspect lease sites and records normally kept on the lease pertinent thereto without advance notice." (Emphasis added.) While the regulatory language mirrors the statutory language in section 108(b) of FOGRMA, which was

⁷ Referring to 43 C.F.R. § 3161.3(a), the court in *Norfolk Energy, Inc. v. Hodel*, 898 F.2d at 1441 n.6, concluded that "[t]here is no question that BLM now has authority to regulate non[-][F]ederal and non-Indian lands in [F]ederally approved oil and gas units[.]"

limited to Federal or Indian lands, the regulation does not specify whether the operator is the operator in the case of a Federal or Indian lease or in the case of a non-Federal/non-Indian lease. Finally, 43 C.F.R. § 3162.1(c) mirrors the statutory language in section 108(c) of FOGRMA, also broadly stating that, “[f]or the purpose of making any inspection or investigation, [BLM] . . . shall have the same right to enter upon or travel across *any lease site* as the operator has acquired by purchase, condemnation or otherwise.” (Emphasis added.)

We think that BLM’s authority, under 43 C.F.R. § 3161.3(a), to inspect a Federal/Indian or non-Federal/non-Indian lease site corresponds to the operator’s responsibility, under 43 C.F.R. § 3162.1(b), to permit such an inspection.⁸ However, while an inspection of a Federal/Indian lease site is not restricted in any way, an inspection of a non-Federal/non-Indian lease site is only permissible where, in accordance with 43 C.F.R. § 3161.3(a), the site is on non-Federal/non-Indian lands “subject to a formal agreement such as a unit or communitization agreement which has been approved by the Department of the Interior and in which the United States or the Indian lessors share production,” and where, in accordance with 43 C.F.R. § 3161.1(b), the inspection is undertaken in order to enforce the applicable regulations with respect to privately-owned mineral lands committed to a unit or communitization agreement which affects Federal or Indian interests that concern “site security, measurement, reporting of production and operations, and assessments or penalties for noncompliance with such requirements[.]” See 43 C.F.R. § 3161.2 (“The authorized [BLM] officer is authorized and directed . . . to . . . inspect . . . the operations that are subject to the regulations in [43 C.F.R. Part 3160]”); *Devon Energy Production Co., L.P.*, 176 IBLA 396, 410-11 (2009) (“BLM thus has the authority to inspect the private . . . well meters, as well as the sales meter, to ensure compliance with the onshore oil and gas regulations” (citing *Tricentrol United States, Inc.*, 97 IBLA at 392 (“43 CFR 3161.3(a) . . . confers authority upon BLM to inspect . . . private lands [communitized with Federal or Indian lands]”))).

⁸ Maralex cites *Norfolk Energy, Inc. v. Hodel*, 898 F.2d 1435 (9th Cir. 1990), for the proposition that 43 C.F.R. § 3162.1(b) does not apply in the case of BLM inspections of private lease sites. See SOR at 8. We agree that the court stated that 43 C.F.R. § 3161.3(a) provided the necessary regulatory authority for BLM to inspect a private lease site. See *id.* (citing 898 F.2d at 1441). It did not, however, address whether 43 C.F.R. § 3162.1(b), correspondingly, compelled the operator to allow access, for inspection purposes, to the private lease site. Nor did it rule out the applicability of that regulation.

We find no evidence that the Department intended to authorize BLM to generally enforce regulations relating to “site security,” “measurement,” “reporting of production,” and assessing or penalizing noncompliance, pursuant to 43 C.F.R.

§ 3161.1(b), and, indeed, to undertake inspections in aid of such enforcement, pursuant to 43 C.F.R. § 3161.3(a), in the case of non-Federal/non-Indian lease sites, and yet preclude BLM from holding the non-Federal/non-Indian operator responsible, under 43 C.F.R. § 3162.1(b), when it fails to allow a BLM inspector access to its lease sites, for the purpose of ensuring compliance with the regulations relating to site security and production verification and assessing or penalizing noncompliance. Such a view is inconsistent with the statutory and regulatory goal of authorizing BLM to inspect non-Federal/non-Indian lease sites to ensure that royalty is properly computed and paid with respect to production correctly allocated to Indian lands, which are communitized with non-Federal/non-Indian lands. See *Tricentrol United States, Inc.*, 97 IBLA at 393-94; Opposition at 7 (“To . . . limit inspections only to those situations where an operator has advance notice and deems it appropriate to allow access to the wells would defeat the purpose of these inspections”). As the court acknowledged in *Norfolk Energy*, BLM must be deemed to have “some limited authority . . . to inspect non-Federal and non-Indian [lease] sites to assure that the Federal and Indian interests are protected.” *Norfolk Energy, Inc. v. Hodel*, 898 F.2d at 1441 (referring to a prior version of 43 C.F.R. § 3161.1, dating from 1984, which “applied to ‘all operations conducted on or for the benefit of a Federal or Indian oil and gas lease,’” and thus implicitly applied to private lands unitized or communitized with Federal or Indian lands, and quoting 49 Fed. Reg. 37356, 37357 (Sept. 21, 1984)).

In the present circumstances, such authority is limited by the requirements that the private lease sites are located on private lands unitized or communitized with Federal or Indian lands, and the inspection is restricted to matters of site security, measurement, reporting of production and operations, and assessments or penalties for noncompliance. 43 C.F.R. § 3161.1(b).

We also are not persuaded that the definitions of “[l]ease site” and “[l]ease” in 43 C.F.R. § 3160.0-5 support Maralex’s interpretation of 43 C.F.R. § 3162.1(b). We note that the term “[l]ease site” encompasses “any lands” on which exploration for or extraction and removal of oil or gas “is authorized under a lease.” 43 C.F.R. § 3160.0-5, emphasis added. We find nothing in the definition per se that precludes its applicability to non-Federal/non-Indian leased lands, or limits its applicability to Federal or Indian leased lands. Nor do we think that such a conclusion is justified by referring to the definition of the term “[l]ease.” Lease is defined to encompass, *inter alia*, any contract or other agreement “issued or approved by the United States under a mineral leasing law” authorizing the exploration for or extraction and removal of oil or gas. *Id.* However, we do not think that this definition is applicable

to the term “[l]ease site,” either because it defines “[l]ease” in the term or because it determines what the definition of “[l]ease site” means when it refers to lands being authorized for exploration or extraction/removal “under a lease.” *Id.* Rather, we conclude that the term “[l]ease site” is not determinable by the definition of the term “[l]ease.”

When the Department first promulgated the definitions of the terms “[l]ease site” and “[l]ease,” effective October 22, 1984, in connection with its initial FOGRMA rulemaking, one comment objected to the fact that the terms were “broad enough to include private and State lands included in Federal units,” and thus asked the Department that the definitions be “strictly limited so that they apply only to Federal and Indian leases.” 49 Fed. Reg. at 37357. The Department declined to adopt the change to the definitions, clearly noting that the reference to lease site anywhere in the regulations encompasses *lease sites on private lands*:

The principle of unitization, or other pooling, is that operations on any committed lease are deemed to be on or for the benefit of any other committed lease. Since all committed leases within a communitized area or unit participating area share in the total production from the communitized tract or participating area *regardless of the ownership of the mineral estate where the wells are located*, the [BLM] must have some limited authority to obtain needed data and to inspect non-Federal and non-Indian [lease] sites to assure that the Federal and Indian interests are protected.
[Emphasis added.]

Id. The Department promulgated the operative language set forth in the definitions of the terms “[l]ease site” and “[l]ease,” which governs all of the regulations in 43 C.F.R. Part 3160. *See id.* at 37363.

Maralex also finds support for its position that 43 C.F.R. § 3161.3(a) governs the inspection of non-Federal/non-Indian lease sites and 43 C.F.R. § 3162.1(b) governs the inspection of Federal/Indian lease sites in the fact that the former provides for the inspection of non-Federal/non-Indian sites “annually” with advance notice, whereas the latter provides for the inspection of Federal/Indian sites “at any time without [advance] notice[.]” SOR at 5; *see id.* at 14-15 (“If the Secretary wanted to inspect non-Federal and non-Indian lease sites more than once annually, the rule could have be[en] drafted to do so”), 15 (“BLM [does not have] . . . the unlimited right to conduct inspections without advance notice[.] . . . which is applicable only to Federal and Indian lease sites under 43 CFR 3162.1(b)”).

The rule at 43 C.F.R. § 3161.3(a) provides for inspecting both Federal/Indian and non-Federal/non-Indian sites in particular circumstances, specifically whenever the site at issue is producing or expected to produce significant quantities of oil or gas in any year or has a history of noncompliance. While it states that non-Federal/non-Indian sites are to be inspected “annually,” as compared to “at least once annually” for Federal/Indian sites, we do not think that the regulation precludes, in either case, inspections more than once a year and at any time.¹⁰ It also does not specify whether the inspection is to be with or without advance notice. Rather, 43 C.F.R. § 3162.1(b) separately provides for inspections “without advance notice,” which is not inconsistent with the requirement of annual inspections, either of Federal/Indian or non-Federal/non-Indian sites. Maralex posits a dichotomy between Federal/Indian and non-Federal/non-Indian sites in the regulations that does not exist.

Maralex also finds support for its argument that 43 C.F.R. § 3162.1(b) does not govern inspections of non-Federal/non-Indian lease sites in the fact that the regulation provides for inspections for the purpose of “determining whether there is compliance with . . . the regulations in . . . [43 C.F.R. Part 3160].” Maralex contends that, while inspections of Federal/Indian sites are for the purpose of enforcing compliance with all Part 3160 regulations, under § 3161.1(a), inspections of non-Federal/non-Indian sites are restricted to enforcing compliance with the site security and production verification regulations of Part 3160 under § 3161.1(b). See SOR at 7-8. We are not persuaded that the language in 43 C.F.R. § 3162.1(b) is properly interpreted so narrowly. Rather, we believe the regulation provides for inspections for the purpose of enforcing compliance with *whatever regulations* are applicable in the case of Federal/Indian or non-Federal/non-Indian sites. Accordingly, we find BLM may inspect private lease sites for the purpose of assessing “site security” and the “measurement” and “reporting” of oil and gas production, as well as for the

¹⁰ We agree that § 3161.3(a) provides for inspecting Federal/Indian sites “at least once annually” and non-Federal/non-Indian sites “annually” in the requisite circumstances. Maralex, however, insists that the language of the regulation precludes inspections of non-Federal/non-Indian sites more than once a year. See SOR at 12-13. We find no such limitation in the rule. Moreover, we agree with BLM that the regulatory preamble states that the annual inspection requirement is a minimum requirement in the case of either a Federal/Indian site or a non-Federal/non-Indian site. See Decision at 3 (citing 49 Fed. Reg. at 37358 (“The general theme of all of th[e] comments is that inspection frequency and coverage be spelled out in the final rulemaking. The regulations in [P]art 3160 only establish minimum standards as to what is to be accomplished.”)).

purpose of issuing assessments or civil penalties for noncompliance in connection with such requirements. 43 C.F.R. § 3161.1(b).

We also note that the CA, to which Maralex is a party, provides that “[i]t is agreed between the Parties Hereto that the Secretary of the Interior, or his duly Authorized Officer, shall have the right of supervision over **all operations** within the Communitized Area . . . insofar as governed by applicable oil and gas regulations of the Department of the Interior.”¹¹ CA, ¶ 13, at 4 (emphasis added). Such “operations” necessarily include operations on the private surface/mineral estate or Indian surface/mineral estate, within the Communitized Area. In accordance with the Department’s applicable regulations, the specified “supervision” necessarily includes the authority to inspect such operations, even when they occur on communitized private surface/mineral estate, for the purpose of ensuring that the Indian interest properly receives its share of royalty on non-Federal/non-Indian production.

Maralex argues that the CA does not authorize the inspection of the lease sites at issue since “the O’Hare[]s did not execute the Communitization Agreement as surface owners or as the operator of the [W]ells,” because Alexis M. O’Hare executed the Agreement “only in his capacity as the President of Maralex,” and thus the O’Hares “are not bound by the terms of the Communitization Agreement.” SOR at 12, 15. However, the wells are situated on the O’Hares’ private lease, which, at the time of communitization, authorized the commitment of the lease to the CA. SG III’s and Maralex’s execution of the CA bound SG III and Maralex and, in turn, the O’Hares, as the lessors who authorized the drilling and production of the Wells under the lease, to the requirements of the Agreement. See CA, ¶ 14, at 4 (“This agreement shall be binding upon the Parties Hereto”); CA, Exhibit “A”, at A-2 to A-3 (“[O’Hares’ Private] LEASE COMMITTED BY: SG Interests III, Ltd. and Maralex Resources, Inc. . . . PROVISION AUTHORIZING POOLING: Yes, as provided for in Oil and Gas Lease [issued by the O’Hares for the SW¼SE¼ and W½SW¼ sec. 35][.]”). In accordance

¹¹ The CA also provides:

The Operator shall furnish the Secretary of the Interior, or his authorized representative, and the Southern Ute Indian Tribe, with a log and history of any well drilled on the Communitized Area, . . . monthly reports of operations, statements of oil and gas sales and royalties, and such other reports as are deemed necessary to compute monthly the royalty due the Indian owners, as specified in the applicable oil and gas operating regulations.

CA, ¶ 4, at 2.

with the CA and the Department's applicable regulations, the "requirements of the Agreement" included authorization to allow the inspection of the private lease sites. See CA, ¶ 13, at 4. In this case, since the O'Hares' private lessees executed the Agreement, the O'Hares are as bound to conform to its provisions as if they had executed it themselves.

To the extent that Maralex argues that BLM's exercise of its authority to inspect the private lease sites now at issue would constitute a violation of the O'Hares' Constitutional rights to avoid unreasonable searches and seizures and a taking of private property for public use without just compensation, it is well established that the Board does not adjudicate Constitutional questions of law. Adjudication of the Constitutional implications of BLM's actions is for the judicial, not the executive, branch of the Federal government. See, e.g., *Laguna Gatuna, Inc.*, 131 IBLA 169, 173 (1994); *Slone v. Office of Surface Mining Reclamation & Enforcement*, 114 IBLA 353, 357–58 (1990); *Tricentrol United States, Inc.*, 97 IBLA at 394-95.

We, therefore, conclude that, in his July 2013 SDR decision, the Deputy State Director properly upheld the four February 2013 INCs, which BLM issued to Maralex for refusing to afford access to the lease sites associated with the Katie Eileen 34-7-35 Well Nos. 2, 2A, 3, and 4, situated on private communitized lands in the S½ sec. 35.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

_____/s/
Christina S. Kalavritinos
Administrative Judge

I concur:

_____/s/
James F. Roberts
Administrative Judge